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S. HRG. 99-593

REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

CONSIDERING THE AUTHORIZATION AND ACTIVITIES OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FEBRUARY 4, 1986

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CONTENTS

STATEMENTS OF MEMBERS

	Page
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa	1
Heflin, Hon. Howell, a U.S. Senator from the State of Alabama	20

CHRONOLOGICAL LIST OF WITNESSES

Breger, Marshall J., Chairman of Administrative Conference of the United States, accompanied by Stephen L. Babcock, Executive Director; Richard K. Berg, general counsel; and Jeffrey S. Lubbers, research director	2

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Babcock, Stephen L.:	
Testimony	7
Letter to Daniel Smith, March 24, 1986	9
Enclosure: List of active research projects	10
Breger, Marshall J.:	
Testimony	2
Prepared statement	23
Letter to Senator Charles Grassley, March 21, 1986	14
Lubbers, Jeffrey S.: Testimony	12

REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

TUESDAY, FEBRUARY 4, 1986

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Present: Senator Heflin.

Staff present: Samuel Gerdano, counsel.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I would like to call the subcommittee to order. Today the subcommittee is meeting for the purpose of considering the authorization and activities of the Administrative Conference of the United States. The Administrative Conference of the United States was established as a permanent, independent agency by an act passed in 1964, called the Administrative Conference Act. The purpose of the Administrative Conference is to study and develop improvements in the procedure by which Federal agencies administer regulatory, benefit and other Government programs, and to make recommendations to agencies, Congress, and others. The Conference consists of a chairman, an executive board, and at most, 91 members made up of agency heads, private lawyers, university professors, and other experts of administrative law and government.

The Conference meets in plenary session at least annually. There the members debate and vote on proposed recommendations. These recommendations are developed by six committees of the membership. Each of these committees has a broad jurisdiction in a number of areas: adjudication, administration, government process, judicial review, regulation and rulemaking. If the Conference ultimately approves a recommendation it is published and transmitted to the affected agency or to the Congress. The value of the Conference, however, cannot be measured by the recommendations alone, although a significant number of these recommendations have been implemented. From time to time, the Conference has been given some very special tasks. One that I am very familiar with involves the developing and monitoring agency procedures, under the Equal Access to Justice Act. The Conference has performed, I

might say, yeoman service in this area, and that is based upon my 5 year's observation of the Conference, and also interacting with the committee's work on the Equal Access to Justice Act.

The Conference serves administrative law in other ways—testifying before congressional committees; facilitating interagency discussions of regulatory topics; publishing useful textbooks on administrative law—for instance the 1985 Guide to Federal Agency Rulemaking and the more recent, Administrative Procedure Sourcebook. These are two examples of the Administrative Conference publications that must be at the fingertips of anyone involved in administrative law.

The Administrative Conference has become, in its relatively short history, a valuable forum through which members can conduct continuing studies of selected problems implicating the administrative process, and can combine their expertise and cooperative efforts toward improving the fairness and efficiency of such procedures.

Now, getting to today's purpose of this subcommittee meeting, we are pleased to have the Chairman of the Administrative Conference, Marshall Breger. Before becoming Chairman, Mr. Breger was a special assistant to the President for Public Liaison and prior to his White House post, Mr. Breger was an associate professor of law at New York Law School, from which institution he is presently on leave. He has also taught at both the State University of New York at Buffalo and the University of Texas Law School, and he is a graduate of the University of Pennsylvania as well as its law school.

Mr. Breger, I have enjoyed working with you in the past and look forward to continued productive relations in your current post and I would like to have you, before you begin your testimony, introduce the people who are with you.

Mr. BREGER. Thank you very much, Senator.

I am delighted to do so. I want to introduce Stephen Babcock, my Executive Director; Dick Berg, my General Counsel; and Jeffrey Lubbers, our Research Director.

Senator GRASSLEY. Would you proceed with your testimony?

Mr. BREGER. Certainly.

STATEMENT OF HON. MARSHALL BREGER, CHAIRMAN OF ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY STEPHEN L. BABCOCK, EXECUTIVE DIRECTOR; RICHARD K. BERG, GENERAL COUNSEL; AND JEFFREY S. LUBBERS, RESEARCH DIRECTOR

Mr. BREGER. Thank you, Mr. Chairman. I want to thank you for the opportunity to testify today in support of legislation to extend the authorization of the Administrative Conference. My name is Marshall Breger.

I became Chairman of the Administrative Conference on October 28, 1985, succeeding Loren Smith, who, as you know, is now the distinguished chief judge of the U.S. Claims Court. So I am still in the beginning of the learning curve, as regards the Administrative Conference and its work.

I know that this committee has been a strong supporter of the Administrative Conference in the past, and I look forward to continued close cooperation with this committee and with this excellent staff. And I wanted, in particular, to tell you how helpful both Alice Milder and Sam Gerdano have been in assisting me with advice as I took over this new assignment.

The legislation before you is a bill to extend our present authorization for an additional 4 years. Our present authorization extends to the end of the current fiscal year. I am sure that all of you are familiar with the general structure of the Administrative Conference. Your prefatory remarks show that. I have a full written testimony which goes into detail and I want to make only a few small points.

Senator GRASSLEY. Let me make it clear, at this point, that the entire statement will be printed in the record, without objection.

So, proceed.

Mr. BREGER. The structure of the Administrative Conference is unique among Federal agencies and reflects the purpose of bringing together knowledgeable persons from within and without the Government for the cooperative study of common problems and the development of a consensus for proposals for improvement. Unlike so much of the Government which is in an adversary context, the essence of the Administrative Conference is in a cooperative context and cooperative search for truth and improvement in the administrative process.

The Administrative Conference's membership includes the Chairman; 10 council members, the council is our board of directors; 44 members designated by those Federal agencies entitled to representation on the Administrative Conference; and 36 public members, appointed by the Chairman with the approval of the council. Thus, the entire Government, nearly all the major agencies are represented on the Administrative Conference and participate actively in its work. And we also have significant participation from the private sector: practitioners, academics, State and local officials. This breadth of representation gives us the benefit of a range of judgment and experience that adds credibility to our final product.

Now, the principal work product of the Administrative Conference, of course, is its recommendations and other formal statements. In its 18-year existence, the Administrative Conference has held 31 plenary sessions and has adopted 109 recommendations and 11 other formal statements. These recommendations range over the entire field of Federal administrative procedure. Some are addressed to problems common to many agencies, and some to a single agency or program. Some recommendations call for legislative action and a few are addressed expressly or impliedly to the courts.

Each recommendation is supported by a detailed research report prepared by a Administrative Conference contractor or by Administrative Conference staff and is reviewed by one of the Conference's standing committees, which considers the recommendation.

Now, I should emphasize that the Administrative Conference has no authority to compel compliance with our recommendations. Our implementation tools are persuasion and reminder. We use a carrot, you might say, not a stick.

Overall, however, we have had much success in obtaining compliance. Although, we do not have as precise information on implementation as we would like.

Another important function of the Administrative Conference is selecting and publishing information on subjects related to administrative law. In addition to the reports which furnish the background and support for our recommendations, we have published a number of studies and reports designed to aid the agencies in conducting their proceedings, and in handling administrative law problems.

The Administrative Conference also performs an important consulting role. Our staff provides advice and information to congressional and agency staff on procedural problems in pending legislation. We file comments with Congress and with OMB and sometimes testify on legislation. We are constantly fielding agency questions on administrative law issues. We serve, in a sense, as an in-house think tank on administrative law for the entire fabric of the federal government.

Now, Congress has relied on the Administrative Conference's expertise in ensuring effective implementation of new legislation affecting administrative law. Senator, as you yourself noted, when Congress passed the Equal Access to Justice Act, agencies were directed to consult with us before adopting their rules and we were told to report to Congress annually on implementation of the EAJA. We responded to the first request by promulgating model roles and we have reported each year to Congress on our activity under the act. When the act was amended last year to include contract disputes, we began to prepare new model rules, which are now well along toward completion and we continue to monitor the act to ensure maximum compliance.

The Equal Access to Justice Act assignment, I might add, was the most recent of several specific statutory assignments from Congress. We were assigned consultative or evaluative responsibilities under the Government in the Sunshine Act, the so-called 4-R Act—the Railroad Revitalization and Regulatory Reform Act—and the Magnuson-Moss Federal Trade Commission Improvement Act.

In my prepared testimony, I have discussed in some detail the Administrative Conference's record of accomplishment over the past 4 years.

I would like to talk now about our plans for the future. With respect to our research program, I intend to commission fewer and larger projects organized around several common themes. In the past, we have focused considerable research effort in the areas of informal rulemaking, and the status of the administrative law judge. We are continuing these efforts. However, we are adding new themes. One of these is alternative means for dispute resolution. We have encouraged agencies to try negotiating regulations and given them guidance on how and when to do it. We intend to observe very closely the experience with what is called, "reg-neg," or negotiating regulations.

And to assist the agencies that use the technique we have a continuing working group in that area and we are constantly attempting to energize the agencies to move into a negotiating status,

rather than an adversary status in attempting to do their rulemaking.

We are following experiments in other agencies that attempt to move into the alternate dispute resolution area in proceedings other than rulemaking. We are looking at the small claims process at HHS and the use of minitrials to expedite settlements at NASA. We have two studies underway in this area—one directed at the techniques employed at the Grant Appeals Board of the Department of Health and Human Services. The other is a more general canvas of the range of informal devices in use throughout the Government. We are also studying the use of nonlawyer representation in administrative proceedings. We intend to broaden these studies of agency experience, and where we find techniques which seem to be working successfully, we will urge other agencies to adopt them.

There has been, I might add, a considerable amount of thought given to how we can move away from the adversary system in the litigation process toward alternate dispute resolution. There has been hitherto very little thought of how to incorporate this creative activity into the administrative process.

The Administrative Conference has been very interested in improving the procedures by which the Government deals with injury or damage claims from the public. We concluded a major study in 1984 of the administrative handling of monetary claims under the Tort Claims Act and other statutes permitting recovery of meritorious claims against the Government.

The report resulted in a recommendation calling for some changes in agency practice and amendment to the Tort Claims Act to prevent claims from becoming time barred because they were filed with the wrong agency or because the Government was substituted for the original defendant.

Our work with the Tort Claims Act has convinced us that the entire governmental liability system needs rethinking, particularly in the light of the tremendous changes that are occurring elsewhere in the law of torts. To that end, the Administrative Conference in 1985 established a special committee on governmental tort claims. The committee is charged with examining the present governmental liability system from top to bottom. The committee sponsored an initial discussion of these issues, by several experts at our June 1985 plenary session. It is now seeking to collect empirical information on just how the doctrines now in place work, their cost, their impact on agencies, and other problems they may cause.

In addition to developing proposals for statutory change, we hope to examine innovations by insurers, corporations, State agencies, and risk assessment specialists, in an effort to encourage Federal agencies to develop managerial responses that will reduce the likelihood of claims arising. Our approach is deliberate. We do not expect to come up with any quick fixes. Our goal is to develop a solid intellectual foundation for improvement in this complex and controversial area. And I might add that while there has been a great deal of heat in this problem of tort liability, we are seeking to add some light as well.

At a time when budgetary considerations seem to dominate almost all discussion of public business, when Gramm-Rudman-Hollings has, so to speak, become a household word, I think it is

important for the Administrative Conference to pay special attention to projects which have a potential for making Government more cost efficient. And one way to do so is to see that Government programs do not inadvertently subsidize persons or industries that are well able to pay their own way. This is a subject that OMB and a number of agencies have expressed a keen interest in. And we are negotiating with several agencies for joint funding of a research project to examine the feasibility of user fees and how they might be calculated and assessed.

I intend to devote more attention to our implementation efforts. We have 109 recommendations outstanding. Many have been fully or substantially implemented. Some have been rendered moot by subsequent events. Some perhaps represent ideas whose time has come and gone. But there are others which are valid and relevant today, and which, if adopted, would improve the operation of the Government. I want the Administrative Conference to undertake a selective implementation effort concentrating on those recommendations which seem to offer the most promise for producing visible results.

In this connection, I cannot let pass the opportunity to remind this committee that H.R. 439, which would implement our recommendation 80 to 5, eliminating or simplifying the "race to the courthouse" in appeals from agency action, was passed by the House of Representatives last year and is now in this committee. The bill has been endorsed by the Administrative Conference, the Department of Justice, the Judicial Conference, and the American Bar Association. We believe that it is good government, and I hope that the committee will give it favorable consideration.

Let me turn now to the particular provisions of the bill before you. The bill would extend the authorization for the Administrative Conference for an additional 4 years, through fiscal year 1990. For the additional 4-year period, it would authorize appropriations of such sums as may be necessary to carry out the purposes of the Administrative Conference Act. Our authorization for the preceding 4-year period was $2,300,000 a year.

Our bill contains one additional amendment to the Administrative Conference Act. We are requesting that the maximum number of members of the Administrative Conference be increased from 91 to 101 and that the maximum number of public members appointed under section 573(b)(6) be raised from 36 to 40. The reason for requesting an increase in membership is that since the enactment of the Administrative Conference Act in 1964, there has been a significant increase in the number of agencies whose exposure to and interest in problems of administrative procedure warrant membership in the Administrative Conference. Conference membership in recent years has been at the statutory maximum and we have accorded nonvoting liasion status to a number of significant agencies and subagencies, including the Merit Systems Protection Board, the International Trade Commission, the Patent Office, the Federal Mine Safety Health and Review Commission, the Immigration and Naturalization Service, and the Postal Rate Commission. If our amendment is enacted, we expect to add approximately six Government members through Presidential designation of additional member agencies, under section 573(b)(3) and/or through allocation

of additional seats to member agencies pursuant to section 573(b)(4). In addition, to preserve the present ratio between Government and public members we contemplate appointing four additional public members, meaning persons from outside the Federal Government, under section 573(b)(6). It is important to emphasize that this proposal will have no perceptible impact on our budget.

This concludes my testimony. I, and my staff, will be delighted to answer any of your questions.

Thank you again.

Senator GRASSLEY. OK. You are asking for a 4-year authorization. Has it been historically funded for 4 years at a time?

Mr. BABCOCK. Yes, Mr. Chairman, that has been the pattern, at least for the last 8 years.

Senator GRASSLEY. Do you have any objections to a shorter period of authorization?

Mr. BABCOCK. Mr. Chairman, we have resisted attempts to shorten the authorization because our agency, while we think that it performs a very, very useful service to the Government, is not the kind of agency that commands a lot of widespread public attention. It is sometimes difficult for the Senate and the House of Representatives to find time to hold hearings, and reducing the spread to every 2 years would perhaps place our authorizing subcommittees in a position of having to hold hearings, even if they did not want to.

We would certainly welcome oversight hearings within the 4-year period at any time that your subcommittee wished to schedule them and would suggest that instead of shortening the authorization so that we would be in a position to be compelled to have hearings, whether or not you felt that they were warranted or not.

Sorry, for that long answer.

Senator GRASSLEY. Can you live with less than the $2.3 million that you have requested?

If so, how much less?

Mr. BABCOCK. Well, we have not requested $2.3 million, sir. OMB has requested for us such sums as are necessary. If a figure were to be put in there, my own personal thought would be that the figure of $3 million might be more appropriate because Chairman Breger has expressed great interest in the Administrative Conference remaining open to new congressional tasks like those that were given us in the Equal Access to Justice Act, most recently. And if we had an authorization ceiling that was right down to our present budget, then we would have to get reauthorized if Congress were to appropriate moneys to perform specific congressional assignments.

So, I believe that we would say that the figure of $3 million would certainly give us enough running room to do whatever Congress asked us to do in addition to what we do now.

Senator GRASSLEY. Well, let us clarify where the $2.3 million came from.

Mr. BABCOCK. It is in our current authorization, Mr. Chairman.

Senator GRASSLEY. OK.

Then I think maybe you have answered this question, but let me ask you what sort of problems you would have if we authorized $2.3 million for each of the years of the authorization?

Mr. BABCOCK. We would not have any particular problems, Mr. Chairman. It would leave us less flexibility to take on new tasks that might be assigned to us.

Mr. BREGER. I think that I should point out for purposes of clarification, Mr. Chairman, that our present appropriation is on the order of $1.430 million, so that we—before Gramm-Rudman-Hollings, my budget officer reminds me—so that we have operated well under our authorization. So our concern here is not in a practical sense that we would be getting a dollar figure that would keep us below any appropriations figure that we might hope for on the basis of our present responsibilities. Rather it is that we would like to have the necessary flexibility. For example, in the late 1970's we were asked to do a very large project on the IRS. We produced a major study of IRS which led to reform. Some people say that there has been some slippage since then in their procedures. But we would not be in a position to undertake a large study like that, even to seek appropriation for it, if our appropriation were already at our authorization ceiling.

Senator GRASSLEY. What has been your appropriated level of expenditure each of the last 4 years?

Mr. BABCOCK. Mr. Chairman, for fiscal year 1982, we received $1.103 million; fiscal year 1983, $1.159 million; fiscal year 1984, $1.123; fiscal year 1985, $1.480 million, a substantial increase that year.

For the current fiscal year, it looks as though, after Gramm-Rudman-Hollings, we will be down to $1.369 million.

Senator GRASSLEY. What have been your staff levels lately?

Mr. BABCOCK. We have, at the end of the last fiscal year, we had full-time equivalent of 19.3. And we were at about that level at the moment.

Senator GRASSLEY. So you have not had any sharp increases or decreases in recent years?

Mr. BABCOCK. We had some decreases in the late 1970's. We had substantially more staff, well, not substantially more, but three more staff than we have at present. We had an increase of staffing with an increase of appropriations which was given to us to conduct the Internal Revenue Service study, that the chairman referred to, and also the Magnuson-Moss study.

But then inflation ate into the increase and through attrition, we reduced the level of staffing.

Senator GRASSLEY. Could you provide a breakdown of your 19 staff members, recognizing that it is a full-time equivalent as opposed to absolute bodies, into lawyers, other professional staff, like economists, and then support staff?

Mr. BABCOCK. Yes, sir.

I can provide that for the record, or if you will give me a few minutes, I can do that in my head. I do not have that broken down with me, but I know who we have got on board at the moment, yes, sir.

Senator GRASSLEY. Do that for the record.

[The information follows:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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March 24, 1986

OFFICE OF
THE CHAIRMAN

Mr. Daniel Smith
Subcommittee on Administrative Practice and Procedure
Committee on the Judiciary
United States Senate
229 SHOB
Washington, DC 20510

Dear Mr. Smith:

Our Chairman sent, this past Friday, responses to questions that Chairman Grassley and Senator Spector had asked us concerning the Equal Access to Justice Act and other matters. These questions had been asked in connection with the recent hearing on our reauthorization bill.

You also telephoned us asking for some additional information. This letter responds to your request.

First, with respect to the staff of this agency, we have on the payroll, as of today, including the Chairman, twelve professional staff members (nine of whom are attorneys) representing aproximately 10.5 FTEs. We have ten other employees representing another 9.0 FTEs.

You also asked for a list of current projects, which I enclose.

Please let me know if there is anything further that I can provide.

Sincerely,

Stephen L. Babcock
Executive Director

Enclosure

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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OFFICE OF
THE CHAIRMAN

Jeffrey Lubbers
Research Director
February, 1986

List of Active Research Projects

(1) Bakken, Larry (Hamline) Agency use of non-ALJ hearing officers. (Status: Data collection completed; case studies chosen, draft report expected by summer.)

(2) Beck, Leland (D.C.) Study of specialized courts for the review of administrative agency decisions. (Status: Revised outline submitted; draft report due this month.)

(3) Braden, Susan (D.C.) Study of FTC and Antitrust Division intervention and competition advocacy activities. (Status: Awaiting draft report.)

(4) Cane, Robert (California Western) Preliminary survey of INS and State Department handling of visa and related applications. (Status: Primarily report completed; it urges an in-depth study; under review by INS.)

(5) Cappalli, Richard (Temple) In-depth study of innovative adjudicative techniques used by the Grant Appeals Board at the Department of Health and Human Services. (Status: Data gathering underway with full cooperation of the Board; draft report due March, 1986.)

(6) Cass, Ronald (Boston U.) Development of a unified theory of compensation for government wrongs. (Status: Preliminary paper delivered at June, 1985 Plenary Session, further work is in conjunction with special ACUS Committee on Governmental Torts.)

(7) Diver, Colin (Boston U.) Division of roles in joint federal/state enforcement programs. (Status: Data gathering underway; draft report due August, 1986.)

(8) Funk, William (Lewis and Clark) Review of experience under the Paperwork Reduction Act. (Status: Draft report submitted; to be considered by Committee on Rulemaking in March.)

(9) Grunewald, Mark (Washington & Lee) Proposal for an administrative tribunal to resolve FOIA and other public access disputes. (Status: Draft report submitted; to be considered by Committee on Judicial Review in March.)

(10) Harter, Philip (D.C.) Agency use of alternatives to adjudication. (Status: Draft report submitted; to be considered by the Committee on Administration in March.)

(11) Hostetler, Zona (D.C.) Non-lawyer assistance to parties and participants in federal agency proceedings. (Status: Report submitted by Professor Rose on economic regulatory agencies did not lead to recommendation; Committee on Regulation requested further study of "mass justice" programs such as the INS, SSA, VA. Draft report submitted; to be considered by Committee in March.)

(12) Johnson, George (George Mason) Split enforcement model (OSHA-OSHRC)—how is it working? (Status: Draft report submitted; to be considered this month by the Committee on Adjudiction.)

(13) Kinney, Eleanor (Indiana) Study of Medicare appeals process. (Status: Just underway; outline due this month; draft report on August 15, 1986.)

(14) Levinson, Harold (Vanderbilt) State administrative law as a source of innovations for adaptation and use by the Federal Government. (Status: In progress; many spinoffs, including legislative veto options paper.)

(15) Luneburg, William (Pittsburgh) Agency handling of petitions for rulemaking. (Status: Just underway, aiming for December, 1986 Plenary Session.)

(16) Mason, Malcolm (D.C.) Preparation of a guidebook for better drafting of grant and assistance-related statutes. (Status: ACUS Staff Attorney Charles Pou is overseeing this project; several meetings with interested lawyers and members of Congressional and agency staff have been held; partial draft of guidebook has been submitted.)

(17) Morgan, Thomas (Emory) Feasibility of regulatory budget proposals and other methods of regulatory cost accounting. (Status: Outline approved by Committee on Regulation; draft report due in March.)

(18) Pierce, Richard (Pittsburgh) Study of use of Federal Rules of Evidence in administrative adjudications. (Status: A survey of ALJs has been undertaken; draft report has been submitted; to be considered by Committee on Adjudiction this month.)

(19) Powell, Burnele (North Carolina) Agency use of declaratory orders under the APA. (Status: Report submitted; under consideration by Committee on Administration; with further consideration of supplemental report and new draft of recommendations in spring of 1986.)

(20) White, Martin (Western New England) Procedural questions raised by the Debt Collection Act of 1982. (Status: Preliminary report received from earlier consultant and was reviewed by Committee on Administration; in-depth study transferred to new consultant due to illness; data gathering underway; draft report due in September, 1986.)

(21) Wolf, Bloch, Schorr & Solis-Cohen (Philadelphia) Study of federal agency hiring of private attorneys. (Status: This study undertaken on pro bono basis by the firm. Interviews in progress; hearing to be scheduled in spring; draft report due July 15, 1986.)

Senator GRASSLEY. Tell me what Gramm-Rudman-Hollings is going to do.

Mr. BABCOCK. You mean the amount?

Senator GRASSLEY. Well, you gave us the amount. What will it do in regard to your staffing and your projects that you are involved in?

Mr BREGER. As Mr. Babcock pointed out, we take an approximately 4.3-percent reduction under Gramm-Rudman-Hollings. We are seeking not to affect our present staffing level. These funds will hurt our research budget which is the way in which we engage in outreach with consultants, usually the top law professors throughout the country.

I should add that we are making efforts, and I am sure that this is a litany that you hear from everybody, but we are making efforts to seek out cost-saving mechanisms and indeed, other sources of support for some of our research projects.

We have arranged with one law firm, which has offered to do a project on a pro bono basis, for us and that will result in a substantial savings. So that we are trying to continue our research pro-

gram by creative means, recognizing that where Gramm-Rudman-Hollings impacts will be in our opportunity to engage in contract research, which is, of course, in an ultimate sense, the lifeblood of our enterprise.

Senator GRASSLEY. Could you describe as best you can the mechanics of how different research topics are arrived at and how research contracts are let?

Mr. LUBBERS. Yes, Mr. Chairman, we have engaged in sort of an outreach program, in terms of attracting qualified research contractors. One thing that we do is that we compile a list of possible topics and then mail them to about 60 or so administrative law professors throughout the country and seek their interest in performing these projects.

We also have been putting up project listings in the Commerce Business Daily lately to see if we can get interest outside the academic community and we have received quite a bit of interest.

So, that is the way that we try to find qualified research contractors. Once we have received expressions of interest, then we try to narrow it down and figure out who would be the best person to undertake the project and negotiate with that person to arrive at an acceptable figure.

Mr. BREGER. And I might add that to the extent to which we are attempting to focus our attention on particular themes, the theme of alternate dispute resolution, cost efficiency, tort liability, as well as continuing our established work in informal rulemaking and the status of administrative law judges, we almost perforce have to take a proactive stance seek out projects which fit into the theme. It is our view that clustering our projects in particular areas will provide for greater impact on the governmental process.

So, we have to plan ahead, we cannot just sit back and wait for people to come to us with ideas.

Senator GRASSLEY. What research contracts are currently outstanding and remain to be completed?

Mr. LUBBERS. Well, I can provide a list of all the projects that we have outstanding.

Senator GRASSLEY. OK. I think that would be best.

Let me ask you, in what areas do you anticipate future research?

Mr. LUBBERS. Well, among the different areas that our Chairman has mentioned, we want to do more in alternative dispute resolution, user fees, as he discussed. We have a number of things in our proposed topics listing, including such studies as a comparative study of the disability programs of the various Federal disability agencies, such as Social Security, Black Lung, Railroad Retirement, and so forth.

We want to take additional looks at the OMB review process now as to how they review agency rulemaking. We have already done a study of the ways that agencies conduct regulatory impact analysis of their rules and we want to extend that to a broader study. And we would like to see how the so-called Bubble Program is working at the EPA, where the agency allows companies to put a fictional bubble over their plant to monitor the emissions from the overall plant as opposed to individual point sources within the plant.

We want to do some more studies in the governmental torts areas, as Chairman Breger mentioned. Possible additional looks at

specialized courts. We already have two projects in the pipeline on that. These are the sorts of things. I can also provide you with a comprehensive list of all the topics that we sent out to all the law professors, if you would like to see that.

Senator GRASSLEY. All right, how long of a list would that be?

Mr. LUBBERS. Fifteen pages.

Senator GRASSLEY. Well, do not bother to submit that. Just a line or so of what you think is important in each project. I think that would be sufficient.

Mr. LUBBERS. OK.

[Information follows:] *

Senator GRASSLEY. I would like to ask, Professor Breger, about the Equal Access to Justice Act, because of your involvement with that and your continuing monitoring of it. You have been involved with it, since day one, as far as I can tell. Of course, you know that I was a sponsor of the 1985 amendments to that act, and its reauthorization.

Now, we have all observed that throughout the act's existence and there have been relatively few, in fact: only a handful, of agency awards each year.

I would like to have your judgment of why you think agencies have been less inclined than Federal courts to make awards?

Mr. BREGER. I would like to answer that in a written letter for the record, so that I can give it full attention, if that would be acceptable to you, Senator.

I think that the courts have had more experience with the whole question of fee shifting, and the whole question of attorney fee awards. They have had experience that goes before, prior to, any Government statutes on the subject. Therefore, they see fee awards as something that is within their universe of possibilities and do not immediately look at it with tremendous skepticism, although, of course, they follow whatever statutory rules apply in particular situations or contexts. I am not sure that agencies have that same level or degree of experience, historical experience with the concept, and therefore, they are not as used to it.

But I will provide you with a fuller response.

Senator GRASSLEY. Could you think of specific agencies that you find are viewing the law's terms too narrowly?

Mr. BREGER. I will have my expert at the Administrative Conference respond to that.

Senator GRASSLEY. I would also like to have you, in your written response, comment on specific agencies which may be frustrating the intent of the law.

Mr. BREGER. Yes, sir.

Senator GRASSLEY. And also what changes you would recommend for Congress to make, short of those recommendations involving agencies which seem to be just purposely frustrating the intent of the law.

Mr. BREGER. Fine, we will do that.

[Information follows:]

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*Not available at presstime.

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March 21, 1986

OFFICE OF
THE CHAIRMAN

Senator Charles E. Grassley
Chairman
Subcommittee on Administrative Practice and Procedure
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

At the Subcommittee's February 4, 1986 hearing concerning the reauthorization of the Administrative Conference, you asked for certain information regarding the operation of the Equal Access to Justice Act. Additionally, you and Senator Specter submitted several follow-up questions relating to our activities in the areas of tort claims and alternative dispute resolution. I am pleased to provide the following responses to these questions.

Question #1 (Senator Grassley)

Why do you think agencies have been less inclined to make awards under the Equal Access to Justice Act than federal courts? Are there specific agencies that you find are viewing the law's terms too narrowly? Are there agencies frustrating the intent of the law? If so, what changes would you recommend for Congress to make?

It is true that there have been few awards under the Equal Access to Justice Act in administrative proceedings--only 21 through September 30, 1984,* as compared to 225 awards through June 30, 1984** in court proceedings. Our study of agency activity under the Act has revealed no one clear reason why this is true. However, based on our experience, we can speculate on a number of factors that have probably contributed to this result.

First of all, fewer applications are processed in administrative proceedings each year than in court cases. Between October 1, 1981, and September 30, 1984, administrative agencies disposed of 181 fee applications, while between October 1, 1981 and June 30, 1984, the federal courts disposed of 451. (Over the same period the administrative agencies received for filing 337 such applications. However, since the Administrative Office of the U.S. Courts does not collect data on EAJA applications until they have been decided, there are no comparable figures on applications received by the courts.) Thus one explanation is that there are substantially more applications made in judicial than in administrative proceedings.

*Our records show that 14 additional awards have been made in administrative proceedings through September 30, 1985; however, data for this period have not been finalized, and this figure may change slightly.

**The Administrative Office of the United States Courts reports its Equal Access to Justice Act data on a July-to-June basis rather than an October-to-September basis.

On the other hand, the percentage of applications that are granted is much lower at the administrative level than in the courts. Awards represented 0% of the administrative applications disposed of in fiscal 1982, 13% in fiscal 1983, and 14.6% in fiscal 1984. By contrast, the courts granted 33% of decided applications through June, 1982, 40.4% between July, 1982 and June, 1983, and 56.6% between July, 1983 and June, 1984.

These figures suggest that there is a greater likelihood of receiving an award from a court than from an agency, and this may be true. Even the most fair and dedicated deciding official will be slow to conclude that his own agency has pursued a case without justification. That several awards have been made where the deciding agency is wholly independent of the litigating agency, e.g. by the Occupational Safety and Health Review Commission against the Department of Labor and by the National Transportation Safety Board against the Federal Aviation Administration lends additional support to this theory. However, there is nothing in the cases to indicate conscious bias against granting awards.

Moreover, there are other possible explanations for the disparity between court figures and agency figures. First, many questions arise as to the applicability of the Act to particular administrative proceedings whereas applicability of the Act is rarely, if ever, at issue in court proceedings. In fiscal 1984, for example, 40 of 76 denied applications were denied because they were filed in proceedings not covered by the Act; 31 of these were filed in administrative Social Security proceedings, in which the government was not represented by counsel. Second, the percentages of applications granted in the courts are skewed dramatically by the high number of awards against just one agency--the Department of Health and Human Services--which was responsible for almost half (25 of 57) of the awards between July, 1982 and June, 1983 and almost 80% (124 of 157) of the awards between July, 1983 and June, 1984. Absent these cases, the court figures are much closer to the administrative figures.

We have seen no evidence of a deliberate effort by any particular agency to frustrate the purposes of the Act. There have certainly been a few particular cases in which agencies appear to have interpreted the Act too narrowly--for example, in one early National Labor Relations Board case, an application was ruled untimely, and therefore barred, because it had been filed with the administrative law judge within 30 days, but not in the agency's Washington office--but these are relatively rare. Instead, the particular circumstances of agency practice often influence the outcome of Equal Access applications. Again, the NLRB, which has received the largest volume of administrative fee applications, provides a good example. The Board's General Counsel brings unfair labor practice proceedings at the behest of aggrieved private parties, not on his or her own initiative. While the General Counsel evaluates the cases before proceeding, it is a longstanding policy of the Board that the General Counsel should not resolve questions of witness credibility (except in the most obvious cases of false charges). Instead, these are to be resolved by the administrative law judge. Thus many applications are denied because the outcome of the proceeding turned on credibility questions.

Situations like this do not lend themselves readily to change through amendment of the Equal Access to Justice Act. Certainly more awards would be made if Congress were to substitute an automatic or presumptive standard for awards for the substantial justification determination, or expand the class of covered proceedings beyond the formal adversary hearings now included. But these modifications would not necessarily further Congress' original purpose in enacting the Equal Access to Justice Act. The expansion of the judicial appeal rights of applicants for fee awards in Public Law 99-80 may do all that is necessary to ensure the fairness of agency fee decisions; it may be best to wait and assess the impact of this change before considering additional amendments to the law, specifically designed to produce more fee awards at the agency level.

In November, we published in the Federal Register draft revised model rules for the guidance of agencies in implementing the amendments to EAJA brought about by Public Law 99-80. We expect to publish final revised model rules in a few weeks and hope that they will help agencies follow the amended Act.

Question #2 (Senator Grassley)

I understand that the Administrative Conference's Special Committee on Governmental Tort Claims will study Bivens-type liability and military medical malpractice liability, among other areas. Since this Subcommittee has bills pending before it on these issues, can you tell me what specific Conference activities or recommendations we can expect to see?

I shall attempt to describe briefly the activities you can expect to see from our special Committee on Governmental Tort Claims. It would be premature to predict what recommendations our members will ultimately agree on, since our research is only beginning and is expected to take at least a full year.

We are following a deliberate, staged approach to our research that will militate against piecemeal "fixes." We plan to start by compiling data on the present government liability system's operation. We will focus initially on collecting (for the first time anywhere) empirical information on just how the doctrines now in place work and their impact (e.g., how many cases of various kinds have been brought, with what result, at what cost to all parties, and with what response by agencies). Further, we hope to examine the nature and extent of the problems caused by existing doctrine, and the managerial responses of states, private concerns, and others to similar problems. Our three initial areas of primary interest are (1) assembling government-wide data on liability litigation under the FTCA and Bivens; (2) studying agencies' responses to liability, including whether, and how, court decisions imposing liability have changed officials' behavior; and (3) examining ways in which entities outside the federal government have used risk management and other tools to reduce the incidence of claims. Following this initial research, we hope to follow up with a second stage of inquiries into specific legal and policy questions. While the specific areas we would study will depend in part on the results of our initial research, possible projects include (1) considering changes in the FTCA's discretionary function exemption to reduce uncertainty and litigation, (2) examining the potential of a central unit to manage risk, develop substantive or procedural regulations interpreting the FTCA or other statutes, or even decide some claims, and (3) assessing the need for additional disciplinary procedures for officials who violate constitutional rights. Ultimately, we hope to develop recommendations in these and related areas, provided that we are able to obtain adequate funding to complete our research.

Question #3 (Senator Grassley)

With regard to corrective legislation in the Bivens-type situtation, I'm familiar with Administrative Conference recommendation 82-6, and have in the past introduced legislation consistent with that recommendation. However, the Judiciary Committee has been deadlocked over the nature of the immunity the government would retain. Do you see any room for compromise on this issue? Is there any way to limit the threat of lawsuits against individual employees without simply shifting potentially enormous liability to the government at the same time?

I hope that the Committee on Governmental Tort Claims will address some of the complex issues involved in revising Bivens-type liability, and I am aware of a number of potential compromises that have been suggested. While I am not endorsing them, and obviously cannot speak for the entire Conference, two ideas put forward by Professor Kenneth Culp Davis, a member of our Committee, are worth exploring. First, he suggests that the government assume liability in these cases, with recovery dependent on a showing that the actions in question, were clearly unjustified under the law at the time of the occurrence. This would substitute an objective test for the somewhat subjective "good faith" standard. Second, he suggests that the Department of Justice, or another government agency, be specifically authorized to develop substantive rules interpreting the FTCA and other liability laws, so as to reduce uncertainty and place limits on the expansion of liability that seems to have accelerated in recent years. Other statutory changes could also limit the government's potential liability for these violations, such as assigning constitutional rights reasonable liquidated values so as to protect them or capping certain kinds of liability. Attention to procedural issues can also ameliorate the danger of excessive liability. Also, agencies can reduce the likelihood of suits with improved risk assessment and planning. These ideas, I realize, are quite tentative, and I hope to have more well-developed suggestions in the future when the Committee is further along.

May I add that we are grateful for your support of ACUS Recommendation 82-6.

Question #4 (Senator Specter)

In your prepared testimony, you mentioned the high priority placed on the search for alternative means of resolving disputes, such as a small claims process at the Department of Health and Human Services and the use of "mini-trials" to expedite settlements at NASA. Could you please elaborate on the procedures and results of these dispute settlements mechanisms. What are your plans to broaden these studies and to urge other agencies to adopt such mechanisms for dispute settlement?

You have asked me to elaborate on my written testimony regarding NASA's use of "mini-trials" and the HHS Grant Appeals Board's small claims procedure, as well as our general plans for urging agencies to adopt such techniques. We now have two studies underway that will, when completed, examine these matters in considerable detail--far more than I can offer at this time. Our current study of the Department of Health and Human Services Grant Appeals Board is examining that body's innovative approaches to resolving audit disallowances, terminations, and other disputes it decides. The Board has jurisdiction over a variety of cases involving disputes between HHS' program offices and the states and others who receive HHS grants. The Board, which had a substantial backlog in 1981, has attempted to expedite its cases by offering mediation services, using telephone conferences heavily, getting involved actively in developing case records, emphasizing written submissions, and using time limits and other scheduling techniques. The Board also employs three customized procedures to help resolve various kinds of cases, such as small claims, more quickly and cheaply. It employs internal time tables for each stage of the process, reinforced by regular monitoring and other devices, to keep cases on track. The Board Chairman's SES contract, in addition, provides that one of his performance measures for bonuses is timely resolution of cases before the Board.

The Conference first examined the operation of the Board, and other agencies' approaches to resolving grant-related disputes, in 1982, when we sponsored a massive study that led to Recommendation 82-2, Resolving Disputes Under Federal Grant Programs. The Conference at that time called for agencies, among other things, to use mediation and other informal processes to resolve grant disputes quickly. Our current study, being done by Professor Richard Cappalli of Temple Law School, is focusing more closely on how the HHS Board has been using these (and related) procedures. We hope to assess how they are working, what grantee and HHS attorneys think of them, and how other agencies can learn from the Board's experience.

The mini-trial used once by NASA is a settlement technique that involves a highly abbreviated litigation process in which litigants present, in a few hours, the heart of their cases to senior officials of both parties who have authority to settle. Its primary purpose is to acquaint responsible executives with both sides of the dispute and force them to participate directly in settlement negotiations. The mini-trial process is quite flexible, with the parties able to tailor procedural elements to fit the case at hand. Ideally, a mini-trial will set a stage, and create momentum, for settlement. In NASA's dispute, a complex one where TRW, Inc. sought payment of over $100 million for performing satellite-related work that it contended was not covered by the initial contract, the case was settled after a mini-trial and two days of negotiations. Several other agencies are considering uses for the mini-trial, including the Army Corps of Engineers. The Department of Justice has begun a pilot program to use mini-trials in contract cases, but only two disputes so far have been handled that way.

Before addressing the issue of our current plans, I should mention that the Conference has already called on agencies to make greater use of settlement and other dispute resolution techniques in several recommendations besides 82-2. In Recommendation 82-4 and 85-5, we encouraged experimentation with negotiated rulemaking, and now are following up to help interested agencies to work out the details. In Recommendation 84-4, we encouraged EPA to begin using structured negotiations to expedite resolution of hazardous waste clean-ups, which that agency has since begun doing.

Now, we are in the process of examining how federal agencies have used, and can use, alternatives to avoid trial-type hearings. We hope to make these inquiries a major part of the Conference's research agenda for the future, resources permitting. We have begun a general study examining the potential for mediation, arbitration, negotiation, mini-trials, and other processes in agency proceedings, as well as ways in which agencies may have private organizations establish mechanisms to hear complaints that

might otherwise be decided by the agency. We have identified a number of programs now in place that make use of these techniques, and are working with a researcher to examine their operation. We will also examine important legal and procedural issues. To date, scholars and organizations using ADR have not given much thought to the applicability of these methods to administrative proceedings, and our study represents the first comprehensive examination of their potential uses in government and the problems they cause. We expect to develop recommendations as to where agencies should seek to make greater use of these techniques, and procedural safeguards to use.

Question #5 (Senator Specter)

You indicated the need for extensive re-evaluation of the Tort Claims Act. What were the preliminary findings of the special Committee on Governmental Tort Claims as presented at your June 1985 plenary session? What additional observations have been made by the Committee between the June session and today's hearing? What initial recommendations, if any, would you make today to change the Federal Tort Claims Act, other governmental liability laws, and related agency procedures?

To date, the Committee has met four times to discuss tort matters and determine a research agenda. It has not yet put together any formal conclusions or recommendations, though I expect it to do so ultimately. At the June plenary, our presenters and members engaged in a general discussion, of the problems of governmental liability, but no formal conclusions or resolutions were adopted. Subsequently the Committee approved a research agenda that will have the Conference and its researchers engage in a staged series of studies looking at existing doctrines, their impact, and potential legislative and managerial responses. These plans are described more fully in response to Question #2, above. Ultimately, we expect to recommend changes in the FTCA, other liability laws and agency practices.

As of today, I can say that, based on two prior Conference studies, we can recommend several statutory changes and agency reforms. In Recommendation 82-6, the Conference called for Congress to amend the Federal Tort Claims Act to substitute the United States as the exclusive party defendant in all damage actions for violations of constitutional rights by federal employees acting within the scope of their employment. The recommendation stated that the government should then be able to assert as a defense any absolute or qualified immunity or good faith defense now available to the employee whose conduct gave rise to the claim. According to 82-6, employing agencies should be responsible for disciplining culpable employees, and OPM should ensure, via guidance and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions. The Conference has also recommended improvements in the agencies' process for receiving, evaluating and settling tort claims (which the FTCA requires claimants to file with the affected agency for possible settlement at least 6 months before proceeding to court). The Conference urges, in Recommendation 84-7, that agencies provide greater guidance to claimants about their rights, assist claimants to avoid running afoul of technical requirements, promote mutual access to relevant information, determine the merits and monetary value of a claim fairly and objectively, and avoid reliance on technical defenses that do not affect the merits. In addition, the Conference calls in Part B of the recommendation for Congress to make two changes in the FTCA's statute of limitations to avoid injustice and systematically to adjust ceilings on agencies' authority for settling claims where inflation has rendered present limits obsolete. I believe that action to carry out these recommendations would be a good start to improving the present system. (The texts of Recommendations 82-6 and 84-7 were submitted as part of the appendix to our testimony.)

I hope these responses will be helpful and would be glad to provide any further information you deem useful.

Sincerely,

Marshall J. Breger
Chairman

cc: Senator Arlen Specter

Senator GRASSLEY. I want to commend the Administrative Conference for getting involved in a systematic study of Government tort claims.

I would also like to ask, how does your special committee on Government tort claims differ from the Department of Justice's working group on tort reform?

Mr. BABCOCK. Mr. Chairman, our special committee was established to try to conduct further empirical research into the area of Government claims—claims against the Government. The Domestic Policy Council, Tort Working Group is looking at a much broader universe—they are looking at product liability, toxic torts, a number of things that affect tort law generally in the United States and not administrative law, as is the focus of our committee.

I might add, that Assistant Attorney General Willard is a member of our special committee and there certainly is plenty of opportunity for such cooperation as may be warranted between the two organizations because of his central activity in the President's Tort Claims Working Group.

And we have pending a request to the Department of Justice for funding to assist in our research because Gramm-Rudman-Hollings has naturally interfered with our research budget. I just spoke yesterday afternoon most recently, to one of Mr. Willard's employees, and we are trying to find some money over there to get our empirical research in our narrow area of focus, so that we can get moving.

Mr. BREGER. I might just add that one of our concerns is that the necessary data has not yet been excavated, you might say, to allow for intelligent judgments in this area. And we think that our special committee can focus on securing the necessary empirical data and then analyzing it.

Senator GRASSLEY. I have just a couple of remaining questions.

I refer to another subject that you brought up—your work in the "race to the courthouse" legislation. You know it was just a few years ago that we read newspaper articles about the activity of lawyers wearing track shoes, racing to this court or that court to file petitions. Has this type of activity died out in any respect?

Mr. BREGER. To my knowledge, it has not died out and I might add, that we have, what some might call the humorous situation of Federal courts ordering agencies to engage in trial heats to see which of the different racing teams actually won when one circuit court has had a filing at 3:01, and does not have a second hand and another circuit court gets a filing at 3:01:30 and in order to decide which actually came there first, the court has asked the agency, in this instance, FERC—the Federal Energy Regulatory Commission—to conduct trial heats to try to decide which filing actually arrived first and they had to do reruns of the race.

So, not only do we have races, we have reruns of the race.

Senator GRASSLEY. So, the legislation is still very much needed?

Mr. BREGER. We believe so, yes, sir.

Senator GRASSLEY. I am not done but I think that I ought to recognize my colleague and very loyal attendee at these hearings, Senator Heflin.

And also I might say, that Senator Heflin has been very much interested in the administrative law judge corps, and has been a leader in that area.

Senator Heflin.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. How are you doing?

I appreciate the chairman recognizing me. I had to be at another place. Unfortunately there are situations where we have to be at so many places at the same time.

I noticed in the morning paper a story about the *Sears & Roebuck* case, involving the EEOC. That really does not affect ycu, but I have followed that case to some degree, and it raises several issues. It appears that the EEOC did not really want to pursue this case, after it got into it, but for some reason, they continued in the case.

At least that is the way that the newspaper reports it. I just wondered whether or not there should be some type of a referral to an administrative conference, or some other agency as to review of their procedure.

I am just thinking out loud. We have an instance where from what I have heard, and what I have read in the newspapers, the Government has spent a lot of money in a lawsuit that the agency did not really believe in. But yet, they pursued it.

I do not know whether there is any remedy or not, I but wondered if you had any comments relative to this? Is this one of the areas that we should look at? It may well be that it would be strictly an agency determination and that the agency did the right thing in the long run.

I am not accusing them one way or the other, but it does raise a question of at a certain time when lower and middle-echelon staff people have filed a suit and then the evidence is not there, the concept of the lawsuit is not valid. Is there any review policy or should there be established in the agency itself, or outside of the agency, any mechanisms, procedures, relative to these matters?

Mr. BREGER. Well, Senator, between my 17-month-old daughter and my focus on my testimony this morning, I have to confess, I did not read the morning paper, so I am not focused on the particular EEOC matter in question, although I believe that I have some general sense of what you are referring to.

But the Administrative Conference in the past has not done studies of organizational decisionmaking of particular agencies. We have paid some attention to the broader question of the coordination of litigation policy between agencies. It certainly is an area that is worth considering investigation, although, I must say that I would have to do some thought, and my staff would have to do some thought, as to whether we are in a position to get the necessary knowledge to make intelligent suggestions in that area.

Senator HEFLIN. And I just wondered whether or not you had any thoughts on it.

Mr. BREGER. We will certainly look into that question.

Senator HEFLIN. The other aspect, of course, is the administrative law judges. I understand that you are looking into this, and I have been convinced for a long time that the administrative tribunals affect tremendous amounts of property of individuals, and assets of various companies and individuals. I think that there are probably more administrative law judges than there are U.S. district court judges, and perhaps maybe circuit court judges as well.

And, of course, largely those numbers come from the Social Security Administration.

They have gone beyond being Hearing Examiners and are participating in adjudication. One of the principles of adjudication is independence. With that in mind, we have been trying to find a method to ensure independence and the perception of independence and if you have any comments relative to this matter, I would be delighted to hear them.

Mr. BREGER. I will ask my Research Director Jeff Lubbers to respond to your inquiry. He is probably one of the leading experts in this country on the whole question of status and independence of administrative law judges.

I would just say in preface, however, that you are absolutely correct, that what happens in the Federal court system is the tip of the iceberg. The real pressure in terms of volume of adjudication is in the administrative agency process, and if one thinks about that, then one begins to understand the importance of having sound adjudication procedures and of ensuring the independence of administrative law judges, who are entering into these adjudications.

Mr. Lubbers.

Mr. LUBBERS. Thank you.

As you may recall, Senator, when our previous Chairman, Loren Smith, and some of us testified on your bill to create an independent corps, we proposed that an experiment be started to try out the idea with a smaller number of Federal administrative law judges from selective agencies to see how the concept worked.

Since then, we have given some further thought to the issue and our Committee on Adjudication felt that most of the problems, apparent problems, in the area of independence and appearance of lack of independence, were in the Social Security area, which has the bulk of the Federal administrative law judges. And the committee, at least, felt that it was premature to change the entire system but that the Social Security Administration ALJ corps issue should be addressed separately.

We also realize that the corps concept has worked quite well in eight or nine States. And that some efficiencies have been created there.

So, at least my personal view, as one who has written in the area, is that the concept has some merit and deserves study and some experimentation on the Federal level, but our full Administrative Conference has not taken a position on this.

It came up before a plenary session last June, but after an extensive debate on the issues, it was tabled, because we could not reach a consensus on it. It is a pretty contentious issue, as you know, even the administrative law judges are split on whether they would like to have a corps. So, it is still a subject for further study and we

would like to focus especially on the Social Security area as the most pressing problem right now.

Mr. BREGER. Mr. Babcock.

Mr. BABCOCK. Senator Heflin, I am Steve Babcock, the Executive Director of the Administrative Conference, and I just wanted to add that you may recall having worked on a paper for a presentation that I organized, a comparative analysis of administrative adjudication in France, England, and the United States at the ABA meeting in London, last July, which unfortunately at the last minute, you could not attend, but your name insured a very good house and it was an excellent discussion and we got Prof. Victor Rosenblum who has done work on this issue to read your paper and pretend like he was Senator Heflin.

Senator Grassley, those numbers on employees, we now have 10.4 professionals, 9.1 nonprofessionals and, of the nonprofessionals 5 secretarial, 4.1 administrative clericals, Xeroxing. That is the current staffing level.

Senator GRASSLEY. OK, I have got two more questions, Professor, but I am going to submit them to you in writing for you to answer.

Mr. BREGER. Thank you.

Senator GRASSLEY. I want to thank you for testifying this morning and for testifying for the Administrative Conference.

I want to also thank you for your help in this subcommittee's oversight work. I take the responsibility of oversight very seriously and look forward to working with you to continue with those periodic checks that we conduct on the bureaucracy to see that the law is being carried out the way that it was written. I also want to suggest that as a matter of administrative procedure for this committee. I am going to keep the record open for 15 days for anybody who wants to submit questions to you in writing and also for any clarification you may want to supply on any of the points you have made here this morning.

Professor Breger, I want to thank you and your staff once again for your cooperation.

[Prepared statement follows:]

Prepared Statement of Marshall J. Breger

Mr. Chairman and Members of the Subcommittee on Administrative Practice and Procedure:

Thank you for the opportunity to testify today in support of legislation to extend the authorization of the Administrative Conference.

My name is Marshall J. Breger. I became Chairman of the Administrative Conference on October 28, 1985, succeeding Loren A. Smith, who, as you know, is now the distinguished Chief Judge of the United States Claims Court. Thus, this is my first opportunity to appear before this committee as Chairman of the Conference. I hope it will be the first of many appearances. The Conference and this committee share a commitment to finding ways to improve the operation of the Federal Government and federal programs, to making the procedures of federal agencies fairer and more efficient. This committee has in the past been a strong source of support to the Conference. It has lent a sympathetic ear to our legislative requests and recommendations, and the Conference, in turn, has tried to be responsive to committee requests for information and comment on legislative proposals. I look forward to continued close cooperation with this committee and its excellent staff.

The legislation before you is a bill submitted by the Conference to extend our present authorization for an additional four years. The Conference's present authorization, enacted in 1982, extends through the end of the current fiscal year. We have in recent years been on a four-year authorization cycle, and since this is an oversight hearing I shall attempt to review in detail the Conference's activities since mid-1982. I believe it is a record of accomplishment which amply justifies extension of our authorization. But since some of you may not be familiar with the background of the Conference — as, indeed, I was not before I took up my present position — let me describe briefly what the Conference is, why it was established, and what we do.

Background and Structure of the Conference

The Administrative Conference of the United States is a federal agency whose mission is to perform studies and to recommend improvements in the administrative procedures of Federal departments and agencies. The Conference was established by the

Administrative Conference Act of 1964, 5 U.S.C. §§571-576, although it was not activated until January, 1968 with the appointment of its first chairman. The Conference was the successor to two very successful temporary Administrative Conferences, one established by President Eisenhower in 1953, the other by President Kennedy in 1961. Other temporary bodies had been established in earlier years to examine the Federal administrative process, notably the Attorney General's Committee on Administrative Procedure in 1939, and the two Hoover commissions in the 1950's. Though the scope and focus of the work of these earlier bodies varied, they all urged the establishment of a permanent Federal organization to conduct a continuing examination of the administrative procedures of the Federal agencies and to recommend improvements. In response to these recommendations Congress passed the Administrative Conference Act which establishes the Conference and empowers it to "study the efficiency, adequacy and fairness of the administrative procedure used by administrative agencies" and to make recommendations for improvements "to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest," 5 U.S.C. §§571, 574.

The essential features of the Administrative Conference make it a unique governmental institution. First, its mission is, in effect, to monitor all aspects of the administrative process in all of the executive and independent agencies; to identify and analyze the causes of administrative inefficiency, delay and unfairness; and to recommend specific means of improving the quality of administrative justice as it affects millions of Americans in their daily lives. Its functions are to study and to recommend. It does not have any operating programs, nor does it have authority to compel compliance with its recommendations.

Second, the Administrative Conference is unique in its composition. Leadership is provided by a full-time Chairman, who is appointed by the President with Senate confirmation for a five-year term, and by a ten-member Council appointed by the President for three-year terms and drawn in part from Federal agencies and in part from private life. Its membership also includes 44 high-level representatives designated by 38 major departments and agencies of the Federal Government, and 36 "public members," distinguished citizens from outside the Federal Government who are specially informed with respect to administrative procedure. While our statute assures that the Government members will compose a majority, it also guarantees a strong input from outside the

Federal Government through participation of private practitioners, academics, state officials and others.

Third, the method of operation of the Conference is unique. The ninety members, other than the Chairman, furnish their time and talents without compensation and beyond their regular full-time Government or private endeavors. The membership constitutes the Assembly, which meets in plenary session at least once and usually twice a year. Proposals are referred to the Assembly for action from the Conference's Committees. Each Conference member is assigned to one of the six standing committees. (In addition, special committees are occasionally established to deal with particular problems.) Committee activities are supported by a small, highly qualified staff in the Office of the Chairman and by contractors, drawn mostly from law school faculties, who perform most of the research which forms the basis for Conference recommendations.

Fourth, the Conference is authorized to make recommendations directly to the agencies, the President, the Congress and the Judicial Conference of the United States. Thus, it may address itself to all problems of administrative procedure, whether they call for administrative, legislative or judicial solutions, or some combination thereof.

Finally, the Administrative Conference is unusual among advisory bodies in its permanence. Most commissions and advisory groups are established for the sole purpose of studying specific problems and cease to exist after they report their findings and conclusions to the Congress or the President. The Administrative Conference, however, as a permanent agency has the opportunity to seek implementation of its recommendations and to develop an institutional expertise. A continually growing responsibility of the Chairman's office is to work with the agencies to effect the recommended changes that will strengthen the Federal administrative process or to seek necessary legislation from the Congress.

We thus have a full-time, permanent independent agency whose sole responsibility is to seek to improve the machinery of government. Since its authority is only recommendatory, the Conference draws its strength from the high calibre of its membership, the quality of its research, and the persuasive force of its recommendations.

Activities of the Conference

The principal work product of the Conference is, of course, its recommendations and other formal statements. In its eighteen-year existence the Conference has held thirty-one plenary sessions, in which it has adopted 109 recommendations and 11 other formal statements. (A statement differs from a recommendation in that it may not call for specific action, but simply directs attention to a problem or states the position of the Conference with respect to a particular matter.) These recommendations range over the entire field of Federal administrative procedure. Some are addressed to problems common to many agencies, such as Recommendation 71-2, Principles and Guidelines for Implementation of the Freedom of Information Act and Recommendation 73-1, Adverse Agency Publicity. Some are addressed to a single agency or program, such as the series of recommendations directed to the Internal Revenue Service's procedures in dealing with individual taxpayers, Recommendations 75-5 through 75-10 or Recommendation 74-3, Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands. Some recommendations call for legislative action, such as Recommendations 68-7, 69-1, and 70-1, which urged abolition of sovereign immunity and certain other technical defenses to suits for judicial review of agency action. (These recommendations were fully implemented by Public Law No. 94-574, enacted in 1976.) A few recommendations are addressed expressly or impliedly to the courts, such as Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, and Recommendation 77-3, Ex parte Communications in Informal Rulemaking Proceedings. Each recommendation is supported by a detailed research report prepared by a Conference contractor or by Conference staff and reviewed by the committee which considers the recommendation. These reports are published in Conference annual volumes and, in most cases, in leading law reviews, so that they receive wide circulation in the administrative law community. They are frequently cited in judicial opinions, and I think it is fair to say that the Conference has sponsored a substantial portion of the significant legal research in administrative law over the past eighteen years.

One of the significant features of the Conference is that its continuing existence enables us to follow up on recommendations by seeking their implementation. The implementation program is primarily a responsibility of the Conference staff.

Recommendations, upon adoption, are published in the Federal Register and forwarded to the affected agencies with a request for a report on the extent to which they are being implemented. Recommendations which call for legislation are sent to the appropriate Congressional committees. The texts of recommendations of continuing general interest are published in Title 1 of the Code of Federal Regulations.

Let me emphasize again that the Conference has no authority to compel compliance with our recommendations. Our implementation tools are persuasion and reminder. Overall we have been generally successful in obtaining compliance. However, because of the large number of recommendations and our inability to devote significant staff resources to surveying implementation, we do not have as precise information on implementation as we would like.

Apart from the development and implementation of its recommendations, an important function of the Conference is to collect and publish information on subjects related to Federal administrative law. One of our statutory assignments is to "collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure," 5 U.S.C. §574(3). The Conference publishes, and encourages the publication elsewhere, of the research reports of its consultants. We also from time to time prepare and distribute other publications. For example, from 1976 to 1978 we collected caseload statistics from the agencies that conduct formal administrative proceedings. This data included not only numbers of cases, but information as to processing time at each stage of the proceeding, quantity of paperwork, and manner of disposition of the proceeding. The results were published in 1980 and have been used in several Congressional and Conference studies of the administrative process. However, because of the costs involved, we have not continued to collect this data. Another collection of information extremely useful to the agencies has been our Directory of Administrative Hearing Facilities, which lists and describes courtrooms, hearing rooms and other locations across the country which are available, usually without cost, for administrative hearings and conferences in order to assist persons in charge of scheduling hearings and conferences to locate appropriate sites. Prior to our collecting this information, there had been no central source of information in the Federal Government on the availability of these facilities. Our initial edition of the Directory was so well received by the agencies that we issued an updated version in 1982. Other significant publications of the Conference have included the Manual for Administrative Law Judges, which has been widely

distributed to federal and state administrative adjudicative officials, and An Interpretive Guide to the Government in the Sunshine Act, which is regarded as the leading authority on the Act, and has been relied on in numerous judicial decisions construing the Act.

The Conference also performs an important consultative role. Our staff provides advice and information to Congressional and agency staff on procedural problems in pending legislation. We file comments with Congress and with OMB and sometimes testify on such legislation. Furthermore, to an increasing extent we have been given special consultative or evaluative assignments in new legislation. Thus, the Government in the Sunshine Act directed all affected agencies to consult with the Conference in the course of preparing their initial regulations. The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act directed the Conference to perform a special study of experience with the new rulemaking provisions in the Act. Most recently, the Equal Access to Justice Act has directed that the agencies consult with the Chairman of the Conference in formulating their procedures for administering the Act and has assigned to the Conference the duty of collecting information from the agencies and reporting annually to Congress on the administration of the Act, 5 U.S.C. §504(c), (e). These statutory assignments of responsibility to the Conference demonstrate increasing recognition of the Conference's achievements, and we welcome them. At the same time they can present a problem, for such assignments tend not to be accompanied by additional budgetary support, and consequently compliance may force the Conference to divert resources from its other functions. This is a subject I shall return to later in my testimony.

Highlights of the Period 1982-1985

During the years 1982 through 1985 the Conference held eight plenary sessions, at which it adopted 23 recommendations and 5 formal statements. The full texts of these recommendations and statements are included in the appendix to my testimony. I will not try to summarize them all, but let me describe some of the more significant ones.

One of the continuing themes of Conference activity, even from the very beginning, has been to improve agency rulemaking procedures. We have continued this work in recent years. Recommendation 83-2 was based on a study of agency use of the "good cause" exemption under section 553 of the Administrative Procedure Act. That exemption permits agencies to omit notice and opportunity for public participation in

informal rulemaking where the agency finds that such procedures would be "impracticable, unnecessary, or contrary to the public interest." The study determined that there was a need for the good cause exemption and that experience showed the exemption had not been abused. However, it concluded that even where notice and public participation are properly omitted prior to issuance of the rule, because of the need for immediate action, agencies should generally provide a post-promulgation opportunity for comment in order to give interested persons a chance to expose any errors or oversights in the formulation of the rule and to present policy arguments for changing the rule. Furthermore, the Conference recommended that after considering the comments the agency should publish a statement indicating the agency's adherence to or plans to change the rule, and include in the statement a response to significant and relevant issues raised by the comments. (This would be the equivalent of the statement of basis and purpose required by section 553 as part of the normal rulemaking process.) Last year the Conference adopted Recommendation 85-2, Agency Procedures for Performing Regulatory Analysis of Rules, which points out to agencies ways in which they can more effectively integrate regulatory analysis into their decisionmaking process, and makes additional suggestions regarding procedures for obtaining and using information on regulatory analysis. This recommendation was based on a massive study by a Conference research contractor, Professor Thomas McGarity, of the experience with regulatory analysis in four departments and agencies.

Another continuing theme of recent Conference activity has been the search for informal means of dispute resolution. We all know that the courts, federal and state, are groaning under the weight of litigation. Administrative agencies are experiencing similar stresses. It is an interesting phenomenon that at the same time that there has been a formalization or elaboration of proceedings that were previously conducted in an informal manner — the obvious example is the evolution of "hybrid" rulemaking — there has been growing dissatisfaction with the costs imposed. Adversary procedures, in particular, tend to impose high resource costs on both the agencies and the participating public. Other procedural devices may impose other costs. For example, to require agencies to explore alternatives or to perform research and analyses they would not otherwise perform costs both time and money, whether or not there is an offsetting benefit in the form of improved knowledge. Beyond these immediate and measurable costs is the perception that adversary proceedings may create rather than simply reflect

adversary relationships, and that they make consensual resolutions more difficult to achieve.

Accordingly, the Administrative Conference has joined in the search for workable alternative mechanisms for dispute resolution. This does not mean, of course, embracing willy-nilly every procedural shortcut or undoing the very real progress that has been made in recent years in securing greater procedural protections for individuals and assuring more informed and rational agency decisions. But we strongly believe that more procedure is not necessarily better procedure, and, in particular, that resolving disputes through consensual devices is frequently superior to adversary procedures.

Several of our recent recommendations reflect this theme. In Recommendation 82-4, Procedures for Negotiating Proposed Regulations, we examined the use of a process in which an agency which desires to develop a rule brings together representatives of the principal affected interests and encourages them to achieve a consensus on the terms of a proposed rule through negotiation. While the agency must retain ultimate responsibility for the rule, the theory of "reg neg," as it is sometimes called, is that the provision of opportunities and incentives to resolve rulemaking issues through negotiation would result in a simpler and a better process and would produce rules more acceptable to those who are affected by them. Furthermore, the likelihood of subsequent litigation is reduced because potential litigants have participated in developing the consensus that led to the rule's formulation. Our recommendation, therefore, calls for agencies to experiment with regulatory negotiation and describes in some detail how the process should be conducted. It also emphasizes that "reg neg" is not suitable for every rulemaking situation, and it suggests some of the factors which should influence the decision whether to use it.

The Conference followed up its adoption of Recommendation 82-4 with a vigorous effort to persuade agencies to try the new technique. A subsequent Conference study of the experience with "reg neg" in the three agencies that tried it resulted in Recommendation 85-5, adopted in December, 1985. In this recommendation the Conference reaffirmed its support for the process and offered additional advice to the agencies on how to make it work. I might add that we intend to continue to press the agencies to implement our "reg neg" recommendations, and we have set up a special interagency working group to assist agencies in finding the necessary resources and expertise for conducting the negotiation process.

Our interest in alternative means for dispute resolution has not been limited to rulemaking. In Recommendation 84-4 we urged the Environmental Protection Agency to place greater emphasis on negotiation of voluntary cleanups at hazardous waste dump sites in its administration of the Superfund program. The recommendation also suggested the use of outside convenors and mediators to facilitate such negotiations and described additional steps EPA could take to encourage greater reliance on negotiated cleanups. Finally, the recommendation emphasized the importance of local citizens' involvement in those aspects of the negotiations that particularly concern them, such as the adequacy of the remedial efforts. In February, 1985 EPA issued, with a request for public comment, an interim policy statement regarding Superfund cleanups which represented a partial implementation of the Conference's recommendation.

Our work in the area of alternative dispute resolution has not been limited to studies and recommendations. In 1982, the Office of the Chairman agreed to provide outreach, training and evaluation assistance to the Merit Systems Protection Board in implementing an experimental system for expedited processing of simple, non-precedential cases. The alternative dispute resolution system, mandated by the Civil Service Reform Act of 1978, was instituted on an 18-month trial basis in five of the MSPB's eleven regional offices during 1983. The Conference first reviewed and made suggestions regarding the MSPB's proposed procedures. It then worked with MSPB representatives and contractors to prepare a two-day course in March 1983 for over 30 participating MSPB employees, with sessions covering the presiding official's role, decision writing, effective mediation techniques, and detailed study of the new expedited procedures. Conference staff worked closely with public policy experts from George Washington University, whom the Conference hired to evaluate the impact of the pilot project, to familiarize them with the experiment and develop a workable evaluation plan. The final evaluation was submitted in early 1985 to the MSPB, which has decided to expand the system to all of its regions.

I intend to give high priority to the search for alternative means of resolving disputes. We are aware of experiments in other agencies, such as a small claims process at HHS and the use of mini-trials to expedite settlements at NASA. We already have two studies under way in this area, one directed at the techniques employed at the Grant Appeals Board of the Department of Health and Human Services, the other a more general canvas of the range of informal devices in use throughout the Government. We

intend to broaden these studies of agency experience, and where we find techniques which seem to be working successfully, we will urge other agencies to adopt them.

Still another theme of Conference activity in recent years has been improving the procedures by which the Government deals with claims for injury from the public. In Recommendation 82-6, Federal Officials' Liability for Constitutional Violations, the Conference recommended that Congress do away with the threat to Federal officials of personal liability for so-called constitutional torts by enacting legislation to provide that the United States shall be substituted as the exclusive defendant in actions for damages against Federal officers and employees for asserted violations of constitutional rights committed within the scope of their office or employment. More recently, in Recommendation 84-7, we addressed the process by which agencies receive, investigate and evaluate monetary claims from the public under the Federal Tort Claims Act and other statutes permitting recovery for meritorious claims against the Government. We did not recommend any basic changes in the system, but we did urge that agency claims officers adopt a more objective and less adversarial posture in handling such claims, as, for example, by taking reasonable steps to help claimants to avoid technical errors in filing claims and by promoting free and open exchange of information with claimants. The recommendation also calls for amendments to the Tort Claims Act to prevent claims from becoming time-barred because they were filed with the wrong agency or because the Government was substituted for the original defendant.

Our work with the Tort Claims Act has convinced us that the entire governmental liability system needs rethinking, particularly in the light of the tremendous changes which are occurring elsewhere in the law of torts. To that end, the Conference in 1985 established a special Committee on Governmental Tort Claims. The Committee, chaired by General Counsel Ronald E. Robertson of the Department of Health and Human Services, is charged with examining the present governmental liability system and recommending changes in the Federal Tort Claims Act (and perhaps other government liability laws) and improvements in related agency procedures. The Committee sponsored an initial discussion of these issues by several experts at our June 1985 plenary session, and is now proceeding with a staged research plan focusing initially on collecting empirical information on just how the doctrines now in place work, their costs, their impact on agencies, and other problems they cause. In addition to developing proposals for statutory change, we hope to examine innovations by insurers, corporations, state

agencies, and risk assessment specialists in an effort to encourage federal agencies to develop managerial responses that will reduce the likelihood of claims arising. Our approach is deliberate; we do not expect to come up with any "quick fixes." Our goal is to develop a solid intellectual foundation for improvements in this complex and controversial area.

We have, of course, continued our consultative and informational activities during the past four years. Two Conference publications are particularly worth noting. In 1983 we published A Guide to Federal Agency Rulemaking. This is a 300-page volume, prepared by the staff of the Chairman's Office, which discusses, step-by-step, the agency rulemaking process, integrating the various statutory and other legal requirements and judicial decisions with practical advice on good rulemaking practices. The book is intended to assist agency rulemaking staffs to keep up with developments in this complicated area, and, incidentally, to bring to their attention the Conference's recommendations respecting rulemaking.

In 1985 the Chairman's Office published the Federal Administrative Procedure Sourcebook. The Sourcebook collects in a single volume the principal Federal statutes, Executive Orders, and regulations that govern administrative procedure. It also includes overviews of the principal statutes, as well as summaries of legislative history, texts of relevant Conference recommendations, bibliographic materials and other research aids. Both the Guide and the Sourcebook have received wide praise.

The Chairman of the Administrative Conference has had important responsibilities under the Equal Access to Justice Act, which provides for the award of attorneys' fees and expenses to certain parties who prevail over the Federal Government in administrative and court litigation, since its enactment in 1981. The Act directed the Chairman to consult with agencies in the development of procedures for handling applications for fee awards in their administrative proceedings, and to report annually to Congress on the awards made in administrative proceedings. As you know, the Act expired in September, 1984, but was reauthorized and amended last summer (Pub. L. 99-80) following Presidential veto of earlier reauthorization legislation.

To carry out our statutory responsibilities, we developed model procedural rules to implement the Act and established a periodic reporting system to collect data from agencies on their processing and disposition of applications for attorneys' fees. Most recently, we have published draft revised model rules reflecting changes in the Act made

by the 1985 legislation; we have received comments on the draft and are now completing work on final model rules. The Chairman's annual report for fiscal 1985 is also nearing completion, and we are in the process of incorporating agency contract appeals boards, newly covered by the Act, into our reporting system.

In addition, the information and expertise developed in the exercise of our statutory responsibilities has enabled the Office of the Chairman to serve as a general resource for Congressional and agency personnel and members of the public seeking advice or information about the Equal Access to Justice Act. We were pleased to be able to assist Congressional committee staff members working on legislation to reauthorize the Act, and we frequently handle informal inquiries from people inside and outside government about the applicability of the Act, its procedural requirements, or the meaning of its substantive provisions as well as about agency implementation of the Act.

We expect this role to continue, as the amended Act presents some new issues and problems. For example, many questions are being raised about implementation of the Act by agency boards of contract appeals, whose structure and procedures differ in some important respects from those of other agencies covered by the Act. Determining the net worth of units of local government is another issue we expect to help agencies with in the coming months. Of course, our annual reporting function will continue to be important as well; it will shed light on the impact of recent amendments to the Act as well as help to identify problems in administration of the Act or the possible need for Congressional oversight of agencies paying a disproportionate share of fee awards.

I believe what I have described is a record of significant achievement over the past four years and reflects credit on my predecessor, Judge Loren Smith, as well as the members and staff of the Conference. Furthermore, it was accomplished with substantially the same level of budgetary and staff resources as in previous years. I think the Committee will agree that it is a record which justifies renewal of the Conference's authorization.

Plans for the Future

Let me, at this point, describe in general terms our plans for the future. Much will depend, of course, on the level of budgetary support available to us, and we are all well aware of the need for economy at every level of government and in every agency.

With respect to our contract research program I am looking to commission fewer and larger projects organized around a few common themes, including those I have previously described. The Conference has traditionally obtained contract research at fairly low prices, because scholars are attracted by the opportunity to work with the Conference and to develop their work into a published article. This enables us to get excellent "bang for the buck," but it does have some disadvantages. At present the academics who perform most Conference research attempt to work it into the demands of their teaching schedules. Conference projects are commissioned with a view to having most of the basic research performed in the summer months by individual researchers, sometimes with modest help from student assistants. This often requires long lead times on projects, and there is often slippage in schedules when Conference needs are subordinated to higher priority demands on our researchers' time. We would like to be able to offer higher contract prices both to increase incentives for prompt completion of our projects and to fund larger scale, more empirical projects. Whether we will be able to do this depends, of course, on our research budgets in the next four years. If the Conference's budget is not increased, another possible approach would be to fund research projects jointly with other interested agencies. We have done this on occasion in the past. While the need for joint funding tends to diminish our control over our research agenda, we may be able to interest other agencies in financing some of the studies we have in mind. At least I intend to explore this possibility.

I intend to devote more attention to our implementation efforts. We have, as I have told you, 109 recommendations outstanding. Many have been fully or substantially implemented. Some have been rendered moot by subsequent events. Some, perhaps, represent ideas whose time has come — and gone. But there are others which are valid and relevant today and, if adopted, would improve the operation of the Government. The Conference should undertake a selective implementation effort, concentrating on those recommendations which seem to offer the most promise for producing visible results.

In this connection I cannot let pass the opportunity to remind the Committee that H.R. 439, which would implement our Recommendation 80-5, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action, was passed by the House of Representatives last year and is now in this Committee. The bill has been endorsed by the Conference, the Department of Justice, the Judicial Conference and the American Bar Association, and I hope that the Committee will give it favorable consideration.

Provisions of the Bill

Let me turn now to the particular provisions of the bill before you. The bill would extend the authorization for the Conference for an additional four years, through fiscal 1990. For the additional four-year period it would authorize appropriation of "such sums as may be necessary to carry out the purposes of" the Administrative Conference Act. Our authorization for the preceding four-year period was $2,300,000 a year.

The reason for the "such sums as may be necessary" language is to permit flexibility in the event we are assigned additional responsibilities. It has been our experience that when Congress assigns new functions or projects to the Conference, these assignments have not been accompanied by funds to carry them out. This happened, for example, in the case of the Equal Access to Justice Act in 1980, which, quite unexpectedly, assigned substantial consultative responsibilities to the staff of the Conference. It is true that our authorization figure has not in fact presented an obstacle to our seeking a supplemental appropriation, but this is only because our appropriations have consistently been well below our authorization.

Membership of the Conference

Our bill contains one additional amendment to the Administrative Conference Act. We are requesting that the maximum number of members of the Conference be increased from 91 to 101 and that the maximum number of public members appointed under section 573(b)(6) be raised from 36 to 40. The reason for requesting an increase in membership is that since the enactment of the Administrative Conference Act in 1964 there has been a significant increase in the number of agencies whose exposure to and interest in problems of administrative procedure warrant membership in the Conference. Conference membership in recent years has been at the statutory maximum, and we have accorded non-voting liaison status to a number of significant agencies and subagencies, including the Merit Systems Protection Board, the U.S. International Trade Commission, the Patent Office, the Federal Mine Safety and Health Review Commission, the Immigration and Naturalization Service, and the Postal Rate Commission. If our amendment is enacted, we expect to add approximately six Government members, through Presidential designation of additional member agencies

under section 573(b)(3) and/or through allocation of additional seats to member agencies pursuant to section 573(b)(4). In addition, to preserve the present ratio between Government and public members we contemplate appointing four additional public members under section 573(b)(6).

It is important to emphasize that this proposal will have no perceptible impact on our budget. There is no direct correlation between the size of the Conference's membership and the cost of its program because, with the exception of the Chairman, all Conference members serve part time and without pay. Government members serve as part of their general agency duties. (Where agencies now participating on a liaison basis are granted full membership, the effect will simply be to change the status of their Conference representation.) Public members receive no compensation for their service other than their travel expenses, including per diem (5 U.S.C. §373(c)). Furthermore, most public members are from the Washington area and do not incur such travel expenses in connection with Conference business. Accordingly, the only budgetary impact of the proposed increase in membership would be a modest increase in our travel expenses, perhaps $1500-$2500 a year.

This concludes my testimony. I and my staff would be delighted to answer any of your questions.

Senator GRASSLEY. This meeting is adjourned.
[Whereupon, at 10:58 a.m., the subcommittee was adjourned.]

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